Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	**CC Docket No. 96-98**
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	)	
II.D. - Definition of "Telecommunications Carrier"	)	
	)	

To: The Commission

COMMENTS OF UTC

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Summary

In prescribing the rights and responsibilities of telecommunications service carriers, the FCC must carefully delineate the types of service providers that fall within the Act's definition of "telecommunications carrier." The statutory definition of "telecommunications service" makes clear that entities operating only private, internal telecommunications systems; entities that operate systems that are shared on a non-profit, cost-shared basis; entities that do not provide service directly to the public (e.g., a carriers' carrier); or entities that only provide service to very limited segments of the public, are not telecommunications carriers. An overly-broad interpretation of this term would have the unfortunate consequence of discouraging utilities and others from providing telecommunications infrastructure that could be used by regulated telecommunications carriers in the provision of competitive telecommunications services.

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Comments of UTC

Pursuant to Section 1.415 of the Federal Communications Commission's (FCC) Rules, UTC, The Telecommunications Association (UTC),[1] hereby submits its comments in response to Section II.D ("Duties Imposed on 'Telecommunications Carriers' by Section 251(a)") of the *Notice of Proposed Rule Making (NPRM)*, FCC 96-182, released April 19, 1996, in the above-captioned matter.

UTC is the national representative on communications matters for the nation's electric, gas, and water utilities, and natural gas pipelines. Over 1,000 such entities are members of UTC, ranging in size from large combination electric-gas-water utilities which

[1] UTC was formerly known as the Utilities Telecommunications Council.

serve millions of customers, to smaller, rural electric which cooperatives serve only a few thousand customers each. All utilities depend upon reliable and secure communications to assist them in carrying out their public service obligations. In order to meet these communications requirements, utilities and pipelines operate extensive private, internal communications networks consisting of both wired and wireless components.

While many utilities and pipelines intend to take an increasingly active role in the provision of telecommunications services, the vast majority will retain a strong need for private internal communications networks. In addition, many utilities and pipelines intend to limit their participation in telecommunications to the provision of infrastructure. Therefore, in crafting its local competition rules it is important that the Commission not unduly burden these critical private networks or inhibit the provision of telecommunications infrastructure. As the organization that took a lead role in ensuring that the Telecommunications Act of 1996 allowed for and promoted utility entrance into telecommunications, UTC is pleased to offer the following comments.

I. Definition of Telecommunications Service

The FCC has adopted the current *NPRM* to implement the local competition/interconnection provisions of the Telecommunications Act of 1996. Specifically the FCC seeks comment on the implementation of Section 251 of the Act. Section 251 imposes general interconnection obligations on all telecommunications carriers, and details specific obligations of local exchange carriers (LECs).

As the Commission is aware, a growing number of utilities and pipelines have expressed a strong interest in actively providing telecommunications services and products. Utilities and pipelines that enter into the provision of such telecommunications services fully expect to be subject to the Act's local competition provisions in the same manner as other similarly situated carriers. At the same time, the vast majority of utilities and pipelines will continue to have a need to operate private internal telecommunications networks that should properly fall outside of the Commission's interconnection regulations. In addition many utilities and pipelines will limit their participation in telecommunications to the provision of infrastructure. The FCC should take care not to apply its common carrier requirements in an overly broad manner that could have the unintended consequence of creating a disincentive for continued utility provision of telecommunications infrastructure. UTC is confident that if the Commission properly structures its rules, the utility industry can play a significant role in the deployment of telecommunications infrastructure and foster the development of competition in telecommunications

Section 251(a) of the Act requires all telecommunications carriers to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers. This requirement is meant to ensure that the users of one carrier's network can communicate with users of another carrier's network In attempting to identify the entities

that are subject to this obligation the FCC notes that the Act defines "telecommunications carrier" as any provider of "telecommunications services." The FCC therefore focuses on the definition of telecommunications service. The Act defines telecommunications service as follows:

> *The offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.*

The FCC seeks comment on which carriers fall within the scope of this definition

A parsing of the definition of "telecommunications service" indicates that in order to be considered a telecommunications service provider an entity must satisfy two requirements: (1) telecommunications has to be offered for a fee; and (2) the service has to be offered directly to the public, or to such classes of users as to be effectively available directly to the public.

A. Offered For A Fee

The first element of this definition makes it clear that Congress only intended it to apply to commercial telecommunications services; that is, services that are offered for a fee. Thus, for example, utilities and pipelines that rely on private mobile and fixed communications networks to safely manage, control and coordinate essential services, and which do not offer the use of such communications services to third-parties for a fee are not telecommunication service providers.

In determining whether a service is offered for a "fee," the FCC should look to whether the service is being offered on a for-profit commercial basis. For example, utilities pipelines and other private system operators often enter into non-profit, cost-sharing arrangements for the construction and operation of private communications networks. Such sharing arrangements have been encouraged by the FCC, particularly in the case of radio-based systems as a means of conserving spectrum Even though one of the private system owners or operators may receive cost-reimbursement from other users, this does not constitute a "fee" in the sense of being a payment for the rendition of a communications service. Therefore, the FCC should not consider non-profit, cost-shared systems as offering services for a "fee."

B. Directly To The Public

The second element in the definition of telecommunications service is that the service must be offered "directly to the public or to such classes of users as to be effectively available directly to the public." By adopting this element of the definition, Congress expressed its intent that the determination of whether an entity is acting as a telecommunications service provider should focus on whether the service provider is itself directly offering service to the end-user public.

Inclusion of the alternative phrase, "or services offered to such classes of users as to be effectively available directly to the public," does not alter this analysis, as this clause also looks to whether the service provider is offering service directly to the end user public

The "effectively available" language was included to ensure that providers who offer service to certain broad classes of end users, rather than the public at-large, are included within the scope of the definition. In this way, carriers who directly serve a sufficiently large segment of the public so as to make their service effectively available to a substantial portion of the public are considered telecommunications service providers. This reading is consistent with the Commission's interpretation of similar statutory language contained in the definition of "commercial mobile radio service" (CMRS). A CMRS provider is defined, in part, as one who makes "service available to the public or to such classes of eligible users as to be effectively available to a substantial portion of the public."[2] The FCC interpreted this language as including carriers who do not limit their offerings to a significantly restricted class of eligible end users.[3] However, unlike the CMRS definition, the new Act's definition of telecommunications service contains an explicit requirement that the provider offers service directly to the public.

Thus, the mere provision of infrastructure, such as "dark fiber" or wholesale capacity to third-party carriers, would not be a "direct" offering of service to the public. Of course, an entity leasing such infrastructure or bulk capacity from a carrier's carrier and

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[2] Section 332 (d)(1) of the Communications Act of 1934 as amended by the Omnibus Budget Reconciliation Act of 1993.

[3] Private carriage in the CMRS context is now limited to the provision of service to certain distinct classes of "eligible users." However, under the Act, a private carrier would be an entity that provides communications service on such an individualized basis that it cannot be reasonably construed as being "effectively offered directly" to the public.

using it to provide for-profit service directly to the public would be offering "telecommunications service."

The legislative history for nearly identical language adopted by the Senate Commerce Committee in the 103rd Congress further validates this interpretation. The Commerce Committee Report to accompany S.1822, the Communications Act of 1994, explains that:

> The term "telecommunications service" is not intended to include the offering of telecommunications facilities for lease or resale by others for the provision of telecommunications services. For instance, the offering by an electric utility of bulk fiber optic capacity (i.e., "dark fiber") does not fall within the definition of telecommunications service.[4]

While S.1822 ultimately was not adopted, its definition for "telecommunications services" was incorporated in large part (including the specification that service be offered directly to the public) into the Telecommunications Act of 1996.[5]

The exclusion of "carrier's carrier" arrangements from the definition of telecommunications services comports with the overall intent of the Act to encourage additional facilities-based competition. By allowing entities such as utilities and pipelines to act as infrastructure providers on a non-regulated basis, new services and competitors

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[4] Report of the Senate Committee on Commerce, Science and Transportation on S.1822, Report 103-367, 103rd Congress 2nd Session, September 14, 1994.

[5] S.1822 contained the following definition for telecommunications services: "[T]he direct offering of telecommunications for profit to the general public or to such classes of users as to be effectively available to the general public regardless of the facilities used to transmit such telecommunications services."

can be introduced in the marketplace.[6] Third-parties that utilize leased capacity to provide commercial telecommunications services directly to the public, would, themselves be considered telecommunications service providers. For example, an interexchange carrier, cable company or competitive access provider that leases "bulk" utility capacity in order to provide service directly to the public falls within the definition of a telecommunications service provider and therefore would be subject to the Act's common carrier obligations; whereas entities which only provide access to telecommunications capacity on a "wholesale" basis to third-party carriers would not be subject to those obligations.

Based on the above analysis, the Act would presumptively impose common carrier interconnection obligations on telecommunications carriers that offer service directly to a substantial class of end users. Included in this definition would be interexchange carriers, local exchange carriers, competitive local exchange carriers and CMRS providers. Entities operating only private communications systems or systems operated on non-profit, cost shared basis, or entities providing only infrastructure, "carrier's carrier" service or service to only a discrete class of end users, are not telecommunications service providers, and would not be subject to the Act's common carrier obligations.

[6] The FCC's 1992 Fiber Deployment Report notes that utilities already provide over 100,000 fiber miles to interexchange carriers helping to promote competition and allowing for more reliable service through the supply of alternate routing.

II. Common Carrier Obligations Only Apply To The Extent That An Entity Offers Telecommunications Services

Section 3 of the Act defines a telecommunications carrier as "any provider of telecommunications services" but states that "a telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services." The straight forward language of this definition requires that the FCC only apply its interconnection and other common carrier obligations to an entity to the extent that it offers telecommunications service.

For example, only those portions of a utility's telecommunications network that are actually used in the offering of telecommunications service would be subject to the Act's interconnection obligations. Other portions of a utility's telecommunications network that are purely used on a private internal basis would not be subject to the Act's interconnection requirements. In addition to conforming with the clear language of the statute, this interpretation makes the most sense from a practical point of view, as Congress clearly did not intend that utilities or other private system operators be required to open access to private internal networks that are used for such sensitive communications as nuclear plant operations.

Consistent with the Act's definition that common carrier obligations only apply to the extent that an entity offers telecommunications services, the offering of information services, in and of themselves, does not trigger interconnection or other common carrier requirements. Accordingly, the bundling of an information service with a

telecommunications service should only create common carrier obligations to the extent that would apply if the underlying telecommunications service were offered by itself.

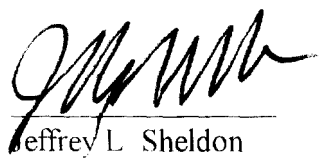
III. Conclusion

In prescribing the rights and responsibilities of telecommunications service carriers, the FCC must carefully delineate the types of service providers that fall within the Act's definition of "telecommunications carrier." The statutory definition of "telecommunications service" makes clear that entities operating only private, internal telecommunications systems; entities that operate systems that are shared on a non-profit, cost-shared basis; entities that do not provide service directly to the public (e.g., a carriers' carrier); or entities that only provide service to very limited segments of the public, are not telecommunications carriers. An overly-broad interpretation of this term would have the unfortunate consequence of discouraging utilities and others from providing telecommunications infrastructure that could be used by regulated telecommunications carriers in the provision of competitive telecommunications services.

WHEREFORE, THE PREMISES CONSIDERED, UTC requests the Federal Communications Commission to take action in accordance with the views expressed in these comments.

Respectfully submitted,

UTC

By: 
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Dated: May 16, 1996